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In the Supreme Court of the United States

October Term, 1977

TELEPHONE COORDINATING COUNCIL TCC-1, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, *Petitioner*

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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SUPPLEMENTAL BRIEF FOR PETITIONER

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This brief is intended to bring to the Court's attention the Fifth Circuit's recent decisions in *Weber* v. *Kaiser Aluminum & Chemical Corporation,* 563 F.2d 216 (November 17, 1977), and *United States* v. *East Texas Motor Freight System, Inc.,* 564 F.2d 179 (December 5, 1977).

In *Weber,* the Court held (one judge dissenting) that neither private parties, nor a federal district court acting pursuant to Title VII of the Civil Rights Act of 1964, as amended, may provide for racial preferences in the admission of employees to a craft training program, in the absence of a finding of prior discrimination against the persons to be benefitted by such "relief".

"There can be no basis for preferring minority workers if there has been no discriminatory act that displaced them from their 'rightful place' in the employment scheme....

• • •

"In the absence of prior discrimination a racial quota loses its character as an equitable *remedy* and must be banned as an unlawful racial *preference* prohibited by Title VII, §703(a) and (d). Title VII outlaws preferences for any group, minority or majority, if based on race or other impermissible classifications,[14] but it does not outlaw preferences favoring victims of discrimination. A minority worker who has been kept from his rightful place by discriminatory hiring practices may be entitled to preferential treatment 'not because he is Black, but because, and only to the extent that, he has been discriminated against.' *Chance* v. *Board of Examiners*, [534 F.2d 993,] 999 [(2d Cir. 1976), *cert. denied*, —U.S.— , 97 S.Ct. 2920]." 563 F.2d at 221, 224-25. (Emphasis in original.)

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[14] "*Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430-31, 91 S. Ct. 849, 28 L.Ed.2d 158 (1971)."

In *East Texas Motor Freight*, the Fifth Circuit vacated a lower court order which awarded retroactive seniority relief on a class rather than on an individual basis. The relief included some seniority dates prior to the effective date of Title VII. The Court stated:

"It appears that, as indicated before, even after the *Teamsters* decision some retroactive seniority relief can properly be granted to 'individual employees' under Title VII (97 S. Ct. at 1865), if the necessary showing of post-Act discrimination is made and other evidence adduced. The difficulty on the present record is that the case was not tried as to individual employees

> and no distinction was made as to pre-Act and post-Act discrimination as to them. As counsel for plaintiffs explained at one point: 'we have not put up proof on trial specifically for them, but it is also true, as the Court of Appeals for the Fifth Circuit has held in *United States versus Time DC* just recently, it would be ridiculous because of the very nature of a Title 7 lawsuit to put on proof on each and every specific individual' (Minutes, October 3, 1975 hearing, p. 18). *All this, of course, has been changed by the Teamsters decision.*" 564 F.2d at 183. (Emphasis added.)

In both *Weber* and *East Texas,* the Court also held that "relief" which may not properly be awarded under Title VII may not be provided under Executive Order 11246, inasmuch as the Executive Order does not provide an independent legal basis for "relief" not sanctioned by the Statute. "[E]xecutive orders may not override contradictory congressional expressions." *Weber* (563 F.2d at 227).

> "Moreover, the Supreme Court in *Teamsters* (97 S. Ct. at 1869) emphasized earlier decisions that Title VII courts had been given broad equitable powers so as to enable them to give the 'most complete relief possible'. In this context, relief was limited to identified victims for whom the necessary showing could be made. If such relief is the 'most complete . . . possible', the Executive Order could scarcely be interpreted to demand more." *East Texas* (564 F.2d at 185).

These rulings in *Weber* and *East Texas* establish a conflict between the Fifth and Third Circuits on the question whether relief under Title VII, including the provision of racial preferences, is limited to actual victims of discrimination, as well as on the underlying issue involving the Executive Order discussed in footnote 19 of the petition for

certiorari. *Weber* and *East Texas,* therefore, provide further support for granting the petition, and setting down the case for plenary consideration.

Respectfully submitted,

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